

Message Text

PAGE 01 GENEVA 07096 220202Z

66

ACTION IO-10

INFO OCT-01 ISO-00 EB-07 CIAE-00 COME-00 DODE-00 DOTE-00

FMC-02 INR-07 NSAE-00 RSC-01 CG-00 COA-01 DLOS-05

SWF-01 L-02 INRE-00 AF-10 ARA-10 EA-10 EUR-12 NEA-10

/089 W

----- 066027

O R 222330Z NOV 74

FM USMISSION GENEVA

TO OECD PARIS NIACT IMMEDIATE 7377

INFO SECSTATE WASHDC 9331

UNCLAS GENEVA 7096

FOR JOHN GERVERS-OPENING OF BUSINESS NOVEMBER 22

E.O. 11652: N/A

TAGS: ECON OECD

SUBJECT: INVISIBLE COMMITTEE DISCUSSION OF UN LINER CODE

REF: OECD PARIS 27811

1. "MAJORITY OPINION.

THE MAJORITY BELIEVES THAT THE CENTRAL PROVISIONS OF THE UNITED NATIONS CONVENTION ARE SUFFICIENTLY CLEAR TO PERMIT A JUDGEMENT THAT THE IMPLEMENTATION OF THE CONVENTION WILL CONFLICT WITH THE LIBERALIZATION REQUIREMENTS OF THE OECD CODE. SEVERAL QUESTIONS ARE CRUCIAL TO A DETERMINATION OF INCOMPATIBILITY: FIRST, DOES THE UN CONVENTION CREATE MANDATORY OBLIGATIONS FOR CONTRACTING PARTIES? SECOND, CAN THESE OBLIGATIONS BE EFFECTIVELY ENFORCED? THIRD, ARE THE PROVISIONS OF THE CONVENTION DISCRIMINATORY? FOURTH? IF DISCRIMINATORY, DOES THIS INVOLVE A CONFLICT WITH THE OECD CODE?

A. MANDATORY OBLIGATIONS: THE MAJORITY BELIEVES THAT THE CLEAR INTENT OF THE DRAFTERS OF THE CONVENTION WAS TO CREATE A MANDATORY, NOT A RECOM-
UNCLASSIFIED

PAGE 02 GENEVA 07096 220202Z

MENDATORY INSTRUMENT, WHICH SPECIFIES RULES OF BEHAVIOR FOR LINER CONFERENCES WITH REGARD TO MEMBERSHIP AND CRAGO SHARING AND REQUIRES GOVERNMENTS TO "TAKE SUCH LEGISLATIVE OR OTHER MEASURES AS MAY BE NECESSARY TO

IMPLEMENT THE CONVENTION."

B. ENFORCEMENT: DESPITE THE MANDATORY CHARACTER OF THE OBLIGATIONS FOR CONFERENCES IN ARTICLES 1 AND 2 AND 22 OF THE CONVENTION AND FOR GOVERNMENTS IN ARTICLE 47, IT MIGHT BE ARGUED THAT CHAPTER VI ON SETTLEMENT OF DISPUTES LEAVES A LOOPHOLE FOR CERTAIN DESIGNATED DISPUTES, (ARTICLE 23(4)) SINCE IT ALLOWS PRIVATE PARTIES (ARTICLE 23(1)) TO A DISPUTE TO IGNORE RECOMMENDATIONS OF THE CONCILIATORS. (FOOTNOTE: THIS CHAPTER (VI) RELATES TO OBLIGATIONS OF PRIVATE PARTIES IN THE EVENT OF CERTAIN DISPUTES AND ENFORCEMENT BY GOVERNMENTS OF DECISIONS REACHED THROUGH THE CHAPTER'S PROCEDURES; IT DOES NOT RELATE TO THE GENERAL OBLIGATION OF ENFORCEMENT OF CODE PROVISIONS BY GOVERNMENTS, WHICH IS COVERED IN THE FOLLOWING CHAPTER (VII) IN ARTICLE 47.) ARTICLE 39(1) COULD BY THIS LINE OF REASONING MITIGATE THE MANDATORY CHARACTER OF THE PROVISIONS ON CARGO-SHARING AND CONFERENCE MEMBERSHIP, SINCE IT SPECIFIES THAT CONTRACTING PARTIES SHALL ONLY ENFORCE RECOMMENDATIONS WHICH ARE ACCEPTED BY PARTIES TO A DISPUTE. BUT IF SOME PARTIES ACCEPT AND OTHERS REJECT A RECOMMENDATION, ENFORCEMENT IN FAVOR OF THE ACCEPTING PARTIES (ARTICLES 37(1) AND 39(1)) WOULD IMPLY ENFORCEMENT AGAINST THE PARTIES WHICH REJECT THE RECOMMENDATION. MOREOVER, IN ANY EVENT, A DISSATISFIED PARTY MAY SEEK REMEDIES IN DOMESTIC COURTS (ARTICLE 25), AND RULING BASED ON NATIONAL LAW WOULD HAVE TO BE CONSISTENT WITH THE PROVISIONS OF THE CONVENTION. (IN CERTAIN CASES PARTIES MUST SEEK REMEDIES IN DOMESTIC COURTS; SEE ARTICLE 23(2).) IT FOLLOWS BY ART. 47 THAT GOVERNMENTS WOULD HAVE TO ENFORCE THE CODE RULES. (FOOTNOTE: ANY CONTRACTING PARTY WHOSE LAWS WERE NOT CONSISTENT WITH THE CONVENTION WOULD BE IN VIOLATION OF ARTICLE 47(1)). THE RESULT IS THAT A CONFERENCE MEMBER WHO DISAGREES WITH THE CARGO-SHARING OR MEMBERSHIP PROVISIONS OF THE CONVENTION WOULD BE UNABLE TO GAIN ACCESS TO A CONFERENCE OR TO COMPETE

UNCLASSIFIED

PAGE 03 GENEVA 07096 220202Z

FREELY FOR TRADE CARRIED BY THE CONFERENCE BECAUSE THE CONCILIATION PROCEEDINGS AND/OR DOMESTIC REMEDIES WOULD BOTH SERVE TO UPHOLD THE CONVENTION. THUS, BOTH THE DISPUTES PROCEDURE AND THE DOMESTIC COURTS PRODUCE RESULTS WHICH HAVE THE EFFECT OF ENFORCING THE PROVISIONS OF THE CONVENTION EVEN WHEN A PARTY TO A DISPUTE DOES NOT ACCEPT A CONCILIATION RECOMMENDATION. ENFORCEMENT IS THEREFORE EFFECTIVE FOR PARTIES WHETHER THEY ACCEPT OR REJECT A RECOMMENDATION, AND THE DISTINCTION EMBODIES IN ARTICLE 39(1) IS MEANINGLESS AS A METHOD FOR AVOIDING APPLICATION OF THE CONVENTION'S RULES.

2. PARAGRAPHS C AND D: UNCHANGED.

3. ARTICLE 2 OF THE CODE OBLIGES GOVERNMENTS TO GRANT AUTHORIZATIONS WHICH RESIDENTS MAY REQUIRE TO CARRY OUT TRANSACTIONS IN THE FIELD OF MARITIME TRANSPORT. THE CONVENTION, HOWEVER, CREATES OBLIGATIONS FOR CONTRACTING PARTIES TO IMPLEMENT THE CONVENTION, AS WELL AS TO ENFORCE ACCEPTED RECOMMENDATIONS ARISING FROM INTERNATIONAL CONCILIATION, WHICH WOULD NECESSARILY BE BASED ON THE DISCRIMINATORY PROVISIONS IN ARTICLE 1 AND 2 OF THE CONVENTION. THE CONVENTION PROVISIONS WOULD THEREFORE BE ENFORCED BY GOVERNMENT ACTION TO THE DETRIMENT OF SHIPPING LINES DISCRIMINATED AGAINST BY THE CONVENTION PROVISIONS, THUS OFFICIALLY WITHHOLDING AUTHORIZATION FROM THESE LINES WISHING TO CARRY OUT TRANSACTIONS IN THE FIELD OF MARITIME TRANSPORT. ARTICLE 9 OF THE OECD CODE SIMILARLY FORBIDS GOVERNMENTS TO DISCRIMINATE AS BETWEEN OTHER MEMBER COUNTRIES IN AUTHORIZING MARITIME TRANSPORT OPERATIONS. YET THE CONVENTION IN ARTICLES 1 AND 2 SETS UP DISCRIMINATORY MEMBERSHIP AND CARGO-SHARING PROVISIONS WHICH GOVERNMENTS MUST ENFORCE UNDER ARTICLE 47 IF NATIONAL SHIPPING LINES INSIST ON THEIR RIGHTS UNDER THE CONVENTION. WHERE AN OUTSIDER SEEKING MEMBERSHIP OR A THIRD COUNTRY SHIPPING LINE SEEKING EQUAL CARGO SHARES IS REBUFFED BY A CONFERENCE OR OTHER CONFERENCE MEMBERS, IT MAY GO TO NATIONAL COURTS OR TO INTERNATIONAL CONCILIATION, BUT NATIONAL COURT DECISIONS OR RECOMMENDATIONS OF THE CONCILIATORS UNCLASSIFIED

PAGE 04 GENEVA 07096 220202Z

WOULD HAVE TO BE BASED ON THE CONVENTION AND WOULD UPHOLD THE DISCRIMINATORY PROVISIONS OF ARTICLES 1 AND 2. GOVERNMENTS WOULD BE OBLIGED BY ARTICLE 47 TO UPHOLD CONVENTION DISCRIMINATORY PROVISIONS OR BY ARTICLE 39(1) TO ENFORCE DISCRIMINATORY RECOMMENDATIONS WITH REGARD TO THE PARTIES WHICH ACCEPT THEM (E.G. THE NATIONAL LINES). THUS, GOVERNMENTS WOULD BE ENFORCING RESTRICTIVE PRACTICES AGREED UPON BY SOME BUT NOT ALL CONFERENCE MEMBERS, AND SUCH GOVERNMENTAL ACTION IN SUPPORT OF DISCRIMINATORY MEMBERSHIP OR CARGO-SHARING ARRANGEMENTS WOULD BE CONTRARY TO ARTICLE 9 OF THE OECD CODE.

4. PARAGRAPHS BEGINNING "NOTE 1 ANNEX A" AND "MOREOVER, NOTE 1": UNCHANGED.

5. PARAGRAPH BEGINNING "UNDER ARTICLE 1" INSERT IN SECOND SENTENCE AFTER "ULTIMATELY LEAD TO" THE FOLLOWING: NATIONAL ENFORCEMENT OF DISCRIMINATORY CONVENTIONS PROVISIONS, OR TO"

6. PARAGRAPH BEGINNING "IT WOULD, OF COURSE": UNCHANGED.

7. PARAGRAPH BEGINNING "UNDER ARTICLE 2" REWRITE AS FOLLOWS: UNDER ARTICLE 2 OF THE CONVENTION NATIONAL SHIPPING LINES IN A CONFERENCE COULD CLAIM A LARGER SHARE OF THE TRADE UP TO THE PERMITTED 40 PERCENT, WHEREUPON A THIRD COUNTRY MEMBER OF THE CONFERENCE MIGHT CHALLENGE THE PROPOSED REDUCTION IN ITS SHARE IN A NATIONAL COURT OR BY BRINGING THE DISPUTE TO CONCILIATION. THE INEVITABLE RESULT WOULD BE A NATIONAL COURT DECISION UPHOLDING THE DISCRIMINATORY CONVENTION RULE, OR A RECOMMENDATION IN SUPPORT OF THE CARGO-SHARING PROVISIONS OF THE CONVENTION, AND IN THE LATTER CASE, ASSUMING THE NATIONAL LINES WOULD CHOOSE TO ACCEPT A RECOMMENDATION IN THEIR FAVOR, NATIONAL GOVERNMENTS WOULD THEN HAVE TO ENFORCE IT AGAINST THE THIRD COUNTRY LINE. EITHER RESULT WOULD INVOLVE OFFICIAL ACTION BY AN OECD MEMBER GOVERNMENT TO PREVENT A THIRD COUNTRY LINE OF ANOTHER OECD MEMBER STATE FROM CONCLUDING A TRANSACTION WITH THE SHIPPER OF ITS CHOICE WHEREVER ITS QUOTA IMPOSED UNDER ARTICLE 2 ON THE CONVENTION WAS FULL. A RESIDENT SHIPPER WOULD UNCLASSIFIED

PAGE 05 GENEVA 07096 220202Z

BE SIMILARLY PRECLUDED FROM AVAILING HIMSELF OF THE SERVICES OF THE THIRD COUNTRY LINER BECAUSE OF THE OFFICIAL ACTION OF HIS GOVERNMENT.

8. PARAGRAPH BEGINNING "CONCLUSION": UNCHANGED.

9. ABOVE DRAFTING CHANGES SUGGESTED TO YOU SERVE ONE PRIMARY PURPOSE. YOUR DRAFT OVEREMPHASIZES ROLE OF RECOMMENDATIONS FROM CONCILIATORS, BY CONTRAST NOT SUFFICIENTLY EMPHASIZING (OR OMITTING ALTOGETHER) THE MORE BASIC CONVENTION OBLIGATION OF ART. 47 THAT GOVERNMENTS MUST IMPLEMENT CONVENTION RULES (A MUCH BROADER OBLIGATION THAN OBLIGATION TO ENFORCE CONCILIATOR RECOMMENDATIONS ACCEPTED BY PARTIES, WHICH IS ONLY ONE OF THE PROVISIONS OF CONVENTION THAT, IN ACCORDANCE WITH ARTICLE 47, REQUIRE IMPLEMENTATION BY CONTRACTING PARTIES.) TO A CERTAIN EXTENT, YOU ARE BEING DRAWN INTO OPPONENTS' ANALYTICAL APPROACH, THEREBY LENDING CREDIBILITY TO A BASICALLY INCREDIBLE ARGUMENT. I RECOGNIZE THEIR ARGUMENTS MUST BE ADDRESSED, NOT DISMISSED OUT-OF-HAND; NONETHELESS, IT IS IMPORTANT TO MAINTAIN OUR GROUND THAT FUNDAMENTAL POINT IS ARTICLE 47. THAT IS THE REASON FOR INSERTING THROUGHOUT YOUR DRAFT THAT RECOURSE TO NATIONAL COURTS AND OBLIGATION TO ENFORCE CODE PROVISIONS IS BASIS FOR CONFLICT WITH CODE, AS WELL AS (AND MORE SIGNIFICANT THAN) ENFORCEMENT OF CONCILIATION RECOMMENDATIONS. ARTICLE 47 REQUIRES CONTRACTING PARTIES TO MAKE THE CONVENTION DISCRIMINATORY PROVISIONS THE LAW OF THE LAND, WHICH NECESSARILY ARE THEN ENFORCED BY THE NATIONAL COURTS. IN TWO ASPECTS THE CODE IS THUS VIOLATED: IN HAVING

TO MAKE DISCRIMINATORY PROVISIONS THE NATIONAL LAW, AND, THEREAFTER, IN ENFORCEMENT OF THEM BY THE NATIONAL COURTS.

10. ABOVE COMMENTS COORDINATED WITH NORWEGIAN REP. AT GENEVA (SELVIG), WHO HAS COMMUNICATED WITH BERGESON, WHO WILL ASSIST NORWEGIAN REP. AT INVISIBLES COMMITTEE DISCUSSION NOV 22. BERGESON HAS PROPOSED REDRAFT LAST SENTENCE PARAGRAPH C. WHICH I ALSO AGREE WITH. RECOMMEND YOU CONTACT BERGESON AT EARLY UNCLASSIFIED

PAGE 06 GENEVA 07096 220202Z

MOMENT AND RELAY THESE COMMENTS TO HIM. HE WILL WORK WITH YOU ON TACTICS, MANNER OF PRESENTATION, MAJORITY DRAFT OPINION.

11. WE HAVE NOT HEARD WHAT HAPPENDED TO IDEA OF REQUESTING OFFICIAL INTERPRETATION FROM UNCTAD SECRETARIAT ON QUESTION OF IMPLEMENTATION. WE CONTINUE TO THINK THIS IS A GOOD IDEA (REF WILLIS/GENVERS TELECON) SINCE WE STAND TO GAIN NO MATTER HOW UNCTAD WOULD COME DOWN ON ISSUE. UNLESS YOU PERCEIVE SUBSTANTIAL OBJECTION, I SUGGEST YOU PRESS FOR THIS APPROACH WHETHER OR NOT UNANIMOUSLY AGREED TO BY INVISIBLES COMMITTEE. IF A MAJORITY WILL AGREE TO APPROACH, WHY NOT FORCE THE ISSUE AND GET UNCTAD VIEWS, OVER MINORITY OPPOSING VOTE?

12. SINCERELY REGRET THIS RESPONSE MUST COME SO LATE. GENEVA RECEIVED CABLE 1400 HOURS AND WILLIS GROUP B CORR DINATING RESPONSIBILITIES IN PLENARY SESSIONS PREVENTED RESPONSE UNTIL LATE EVENING. DALE

UNCLASSIFIED

<< END OF DOCUMENT >>

Message Attributes

Automatic Decaptioning: X
Capture Date: 27 JUL 1999
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: MARINE TRANSPORTATION, SHIPS, STANDARDS, INVISIBLES (BALANCE OF PAYMENTS)
Control Number: n/a
Copy: SINGLE
Draft Date: 22 NOV 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: n/a
Disposition Approved on Date:
Disposition Authority: n/a
Disposition Case Number: n/a
Disposition Comment:
Disposition Date: 01 JAN 1960
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974GENEVA07096
Document Source: ADS
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: n/a
Film Number: D740338-0195
From: GENEVA
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19741186/abbrzasw.tel
Line Count: 253
Locator: TEXT ON-LINE, TEXT ON MICROFILM
Office: ACTION IO
Original Classification: UNCLASSIFIED
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 5
Previous Channel Indicators:
Previous Classification: n/a
Previous Handling Restrictions: n/a
Reference: OECD PARIS 27811
Review Action: RELEASED, APPROVED
Review Authority: kelleyw0
Review Comment: n/a
Review Content Flags:
Review Date: 26 SEP 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <26 SEP 2002 by chicheje>; APPROVED <12 FEB 2003 by kelleyw0>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: INVISIBLE COMMITTEE DISCUSSION OF UN LINER CODE
TAGS: ECON, OECD
To: OECD PARIS NIACT INFO STATE
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005